90-1818

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

MITZI BEVERS,

Petitioner,

v.

CAMILLE DeLOACH,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Has the United States Court of Appeals for the Tenth Circuit erroneously expanded upon *Malley v. Briggs*, 475 U.S. 335 (1986), in conflict with decisions from at least the Second, Seventh and Eighth Circuits, by holding that a police officer's affidavit of probable cause exposes that officer to civil liability under 42 U.S.C. § 1983 where there is an omission of evidence that might arguably have been exculpatory and might arguably have cast doubt upon the existence of probable cause?

Having answered the first question in the affirmative, has the United States Court of Appeals for the Tenth Circuit further erred in deciding that the defect in the affidavit is not cured so as to relieve the officer of civil liability under § 1983 even though there has been a preliminary hearing, during which testimony was heard, the Defendant was represented by counsel, and had the opportunity to cross-examine witnesses, culminating in a judicial determination of probable cause?

Has the United States Court of Appeals for the Tenth Circuit erred in depriving this officer of the defense of qualified immunity?

PARTIES INVOLVED

The parties involved in this proceeding are as they appear in the caption of the case, but more particularly are:

Petitioner, Defendant/Appellant below, Detective Sergeant/Special Deputy United States Marshal Mitzi Bevers (now Welsh);

Respondent, Plaintiff/Appellee below, Camille (Mrs. Dennis) DeLoach

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Tenth Circuit entered in these proceedings on December 31, 1990, affirming a judgment entered in the United States District Court for the Western District of Oklahoma on August 19, 1988.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 922 F.2d 618 and is reproduced in the Appendix hereto.

JURISDICTION

Appellant's Petition for Rehearing was denied by the United States Court of Appeals for the Tenth Circuit on February 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Plaintiff predicated jurisdiction of the trial court upon federal question jurisdiction statutes and Appellant predicated jurisdiction of the United States Court of Appeals for the Tenth Circuit on a timely filed appeal pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISION

42 U.S.C. § 1983 provides, in part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity or any proceeding for redress."

STATEMENT OF THE CASE*

***Plaintiff/Appellee/Respondent DeLoach will hereafter be referred to by name or as "Plaintiff"; Defendant/ Appellant/Petitioner as "Defendant".**

Introduction:

On April 24, 1987, the Honorable Wendell Smith, a Judge of the Seventh Judicial District of the State of Oklahoma, found probable cause to believe the crime of murder in the first degree was committed in Oklahoma County by Camille DeLoach, after a preliminary hearing at which Ms. DeLoach was represented by Mr. D. C. Thomas and Mr. Mack Martin, two of the most eminent criminal defense counsel in the State, and after 11 witnesses had presented testimony on direct, and cross-examination. A jury was impanelled to try the accused for that crime, and thus double jeopardy attached. Shortly thereafter, the District Attorney dismissed the charge. Thus, Camille DeLoach was neither convicted nor acquitted of the murder of one Ryan T. Swift, an infant of 18 months who had been placed into her care.

The court below held Judge Smith's determination could be ignored because the defendant detective "manipulated" the process by "concealing the exculpatory opinion of a key medical expert", (one John H. Stuemke), in both her affidavit of probable cause and, subsequently, at the preliminary hearing. The court's conclusion was predicated on a finding that defendant knew Dr. Stuemke believed one of the child's parents was "much more likely" to have struck the fatal blow and that the blow could have been struck 24 hours or more before Ryan became comatose. The court found Defendant's omission of that opinion to be reprehensible even though

it also found the information in the detective's affidavit to be true:

> From the further investigation by the affiant and interviews with Dr. Polk who was the treating neurologist on the case, Dr. Polk told this affiant that he performed a craniotomy and that Ryan T. Swift suffered an acute injury from a blow to the head. *Dr. Polk and Dr. Cagle both related to the affiant that the victim, Ryan T. Swift, would have immediately gone into unconsciousness.* Dr. Cagle was the assisting neurologist in the case and was present during the craniotomy. Both Dr. Polk and Dr. Cagle told the affiant that the injury had to be one of a nonaccidental nature. [Emphasis supplied.]

The court determined that the affidavit was fatally defective for failing to include a statement that the blow could possibly have been struck earlier, which thus might have cast doubt on Camille DeLoach's guilt, since she had had exclusive custody of the child for only eight hours. (The court does not address whether the affidavit should then have also necessarily included statements casting doubt on Stuemke's credibility: e.g., that he never saw the baby; that the detective had contacted and interviewed the waitress at the restaurant where Ryan's mother had taken the baby to dinner the night before and the waitress had related the baby and mother appeared fine, in good health and appropriate in their relationship, thus eliminating the 24-hour time frame in Stuemke's hypothesis.)

What led the court to promulgate a rule imposing civil liability on an officer for failing to make "10-b-5 disclosures" in an affidavit of probable cause – for failing

to "tell all", even evidence that appeared to the officer to lack credibility?

What led the Court to promulgate a rule imposing civil liability on an officer for failing to volunteer more testimony than that responsive to the questions asked of her during cross-examination and a rule which furthermore by necessary implication denigrates the capacities of a state court judge who is presumed to have been misled into a finding of probable cause by what this officer did not say, as if there had not been ten other witnesses?

The answers lurk in the context of the factual background of this case and in the ire of the court over certain isolated facts, an ire that misled the court into applying law that was manifestly distinguishable.

The Factual Background:

When Ryan's father left him at DeLoach's home, where Camille ran an unlicensed day care operation for a few children, on the morning of September 11, 1985 he was conscious; when Ryan's mother arrived to pick him up at 4:00 that afternoon, he was comatose. He was taken to a hospital, where he died the next day from swelling of the brain caused by a severe blow to the head.

The four attending physicians, including the neurosurgeons who operated on Ryan, were of the opinion that the blow to Ryan's head was so severe – the equivalent of dropping the child from a second or third-story building – that it would have rendered him unconscious immediately, and, therefore, had to have occurred while Ryan

was in DeLoach's care. The medical examiner who performed the autopsy on Ryan, and Dr. Stuemke, a child abuse expert who never saw Ryan but subsequently examined his medical records, were of the opinion that the blow could have been delivered some time before the morning of September 11.

Defendant was the police detective assigned to investigate Ryan's death. Beginning the night of September 11, 1985 when she was summoned to the hospital and for a month thereafter, the Defendant interviewed more than a dozen witnesses in addition to the doctors, including other parents who had had children in Plaintiff's care and related bizarre incidents of her temper, and the Swifts' former babysitters and housekeeper, who related they were caring parents. Defendant came to believe that Camille DeLoach was the most probable perpetrator. Some time in October 1985, she presented the case file of her investigation to Assistant District Attorney Donald Deason. Also at some time in October of 1985, Defendant and Dr. Stuemke met, along with the DA according to Stuemke's testimony, and Stuemke shared his hypothetical opinion that most abuse occurs in the home and that the pattern of bruises on this child were indicative of a history of abuse. This baby did not die of bruises.

Although it was patent that this child died of a severe blow to the head and that the bruises on his body had nothing to do with the cause of death, Deason declined to proceed, uncertain whether he could establish guilt beyond a reasonable doubt. But in March 1987, at the urging of Douglas L. Polk, M.D., one of the attending neurosurgeons, District Attorney Robert Macy decided to initiate prosecution of DeLoach for first degree murder.

At the request of the DA, Defendant prepared an affidavit of probable cause.

A warrant for DeLoach's arrest was issued by a magistrate. Defendant had not been involved in the independent investigation of this case by DA Macy in 1987. Defendant had not been involved in the investigation of this case since charges were declined in October of 1985. Nonetheless, Plaintiff's theory is that Defendant prepared that affidavit out of a spirit of revenge. Plaintiff's theory hinges on the evidence that Camille wanted to arrange to turn herself in rather than be arrested, and when Defendant said that the warrant had already been issued and she was not empowered to make those arrangements, Defendant remarked: "Payback is hell". Supposedly that statement proved that Defendant's omission of any reference to Dr. Stuemke in her affidavit, and truncated testimony concerning his opinion at the preliminary hearing[1] was motivated by a desire to retaliate against Camille DeLoach because an attorney had been hired for her early on in the investigation.

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[1] With reference to the affidavit of probable cause, the court found Defendant deliberately concealed any reference to Stuemke. At the preliminary hearing, the fact that Stuemke had been contacted for his opinion was not concealed, and thus the court switched to the concept of "mischaracterization". Defendant did not mischaracterize the evidence at the preliminary hearing. She answered the questions asked of her by Mr. D.C. Thomas during his 20-page long cross-examination. When asked what doctors she had spoken with, Defendant testified that she had contacted Stuemke about the bruises and Mr. Thomas' only question was: "They didn't have anything to do with the child's death at all, did they?" ("No.") Defendant was

(Continued on following page)

Police officers have many cases to occupy their attention. It is difficult to fathom that an officer who was bent on retaliation would abide inaction for one year and four months and not re-involve herself in an investigation until directed to do so by the district attorney. But let us assume that having been directed to re-involve herself in the charge, she did so with some relish. Since she had become reasonably certain that Ryan was immediately knocked unconscious by the massive blow, Plaintiff was the clearly apparent suspect. In her mind, the evidence suggested Plaintiff murdered this baby. Defendant may well have been motivated by a disinclination to bend over backward with civility.

But so what!?! The fact of the matter is Defendant did not create probable cause; probable cause existed.

(Continued from previous page)

then asked whether either Drs. Polk or Cagle had changed their minds. ("No.") She was then asked whether Dr. Choi had a time frame of 48-56 hours for this injury. ("I was advised 4 to 48 hours.")

We fail to understand how to square the rule promulgated by the Tenth Circuit that this officer is liable for answering the questions asked of her at preliminary hearing, thus "mischaracterizing" by not volunteering more, with *Briscoe v. La Hue*, 460 U.S. 325 (1983), as applied in *Holt v. Cataneda*, 832 F.2d 123 (9th Cir. 1987), which holds that a police officer who gives perjurious testimony during an adversarial pre-trial proceeding in a criminal matter is entitled to absolute witness immunity from liability for damages flowing from his testimony. The court reasoned *Briscoe* would extend to any pre-trial proceeding where, as here, testimony is taken in the crucible of cross-examination, and cited comparable *Briscoe* progeny from other Circuits.

Neither the courts below nor Plaintiff herself ever claimed that Plaintiff would not have been bound over, even if Stuemke's opinion had been referenced in the affidavit and even if he had been called by Plaintiff to testify at preliminary hearing. Stuemke's opinion did not exonerate Plaintiff; it merely tended to inculpate the parents as alternative suspects. Stuemke's opinion merely conflicted with the opinions of the attending physicians and Ryan's pediatrician – all of whom testified at preliminary hearing – it did not somehow magically erase their opinions. Indeed, the neurosurgeons maintained their studied belief that the blow was too massive for any response other than an immediate loss of consciousness after they knew what Stuemke thought; even at this trial, when Dr. Polk was asked whether Stuemke's view changed his clinical opinion as to the condition of Ryan's brain and subsequent unconsciousness, Dr. Polk responded: "He unequivocally did not". Thus, even had Stuemke testified at the preliminary hearing, given the testimony of the other doctors, the state court judge would have had no other choice but to find probable cause existed, and to refer the determination of "beyond a reasonable doubt" to a jury. Since defendant did nothing to induce that determination and could have done nothing that would have altered that event, her motive is immaterial.

All of these facts, however, were reduced to insignificance in comparison with the meaning that was attributed to the one statement: "Payback is hell". Nobody apparently liked this police officer. She is a capable and experienced detective who does not mince words, nor does she curry favor. Her demeanor is professional and

precise; or, it could be interpreted as hard and clipped. Posited against that presentation was the Plaintiff, who orchestrated herself to the jury as a demure and reserved housewife who did babysitting in her home, where this horrid tragedy just sort of happened. Everybody apparently rose to her defense.

Because of this allocation of sympathy and prejudice, the void in this case where proof of causation should be has been ignored, and the law governing affidavits of probable cause and issue preclusion has been stretched so thin to cover the facts in this case that it has been warped.

REASONS FOR GRANTING THE WRIT

Proposition I: **THE RULE PROMULGATED BY THE TENTH CIRCUIT THAT AN OFFICER MAY BE LIABLE FOR LEAVING SOMETHING OUT OF AN AFFIDAVIT THAT ARGUABLY MIGHT NEGATE PROBABLE CAUSE IS AN IMPROPER, AND IMPRACTICABLE, EXTENSION OF SUPREME COURT LAW THAT HOLDS AN OFFICER LIABLE FOR EXECUTING AN AFFIDAVIT NO REASONABLE OFFICER WOULD HAVE SIGNED.**

We have no problem with the Tenth Circuit's adoption of the rule that liability may attach when an officer prepares an affidavit in such a way as to make it sound as if probable cause existed, when the officer knew or should have known probable cause in fact did not exist, whether that pretense be accomplished by what is said or what is left unsaid. However, the Tenth Circuit makes the transition from what is a statement of fact to what is an

omission of fact without appreciation of the fact that the transition is really a quantum leap and requires some bridgework.

When dealing with a false statement that was included in the affidavit, it is a relatively easy evidentiary task to determine whether a reasonable officer would have known the statement was false and would not have signed the affidavit. However, when dealing with an omission, it is not easy to define the question much less the answer. Should liability attach if a reasonable officer would have given more credence to that omission than the affiant did and thus would not have prepared the affidavit without including it, even if it was not material? What if a reasonable officer would not have found it credible at the time, but it later proved to be material? What if the officer in truth and in good faith doubted the credibility of the evidence, and therefore its materiality, and thus omitted it?

The problems could be contained if the standard were uniform. The question of whether an affidavit is fatally defective because of a false statement is whether the affidavit, taking out the false statement, would still have stated a case of probable cause. If the answer is no, then the false statement was a statement of material fact and by reason of its falsity the affidavit is fatally defective. The test for determining whether an omission is material and renders the affidavit fatally defective by reason of its absence should be the same in reverse: would the affidavit state probable cause had the omission been included?

The Tenth Circuit did not address those questions, and avoided them by changing the standard in one paragraph from a requirement that the omission negate probable cause, to being at least a "clearly critical" omission, to requiring only "strong evidence that probable cause would have been vitiated", and concluded with the further reduced standard that the omission need only be "material enough".

The Tenth Circuit has eviscerated the Fourth Amendment's preference for a warrant by promulgating a standard for an affidavit of probable cause that circumvents every limitation the Supreme Court has placed on impeachment of an affidavit. This is precisely the development that the Honorable Chief Justice Rehnquist foresaw in his dissenting opinion in *Franks v. Delaware,* 438 U.S. 154 (1978):

> "The Court has commendably, in my opinion, surrounded the right to impeach the affidavit relied upon to support the issuance of warrant with numerous limitations. My fear, and I do not think it an unjustified one, is that these limitations will quickly be subverted in actual practice . . . I greatly fear that this generalized language [of the majority] will afford insufficient protection against the natural tendency of ingenious lawyers charged with representing their client's cause to ceaselessly undermine the limitations which the court has placed on impeachment of the affidavit offered in support of the search warrant." (At p. 187.)

In obliterating those limitations, the court ignored its own authority. In *Easton v. City of Boulder, Colorado,* 776 F.2d 1441 (1985) the Tenth Circuit held:

> Even with respect to evidence admitted during a trial, we have noted that 'evidence is not necessarily insufficient merely because the witness' testimony has been contradictory and the explanations therefore difficult of belief'. *United States v. Jackson*, 575 F.2d 553, 558 (10th Cir.), cert. denied sub nom; *Allen v. United States*, 439 U.S. 981, 99 S.Ct. 569, 58 L.Ed.2d 652 (1978). See also *United States v. Tropiano*, 418 F.2d 1069, 1074 (2d Cir. 1969). ('A witness may be inaccurate, contradictory and even untruthful and yet be entirely credible in the essentials of his testimony.') Cert. denied, 397 U.S. 1021, 90 S.Ct. 1262, 25 L.Ed.2d 53 (1970); *In Re. A.H.B.*, 491 A.2d 490, 495 (D.C. App. 1985) ('A certain amount of inconsistency in the evidence is almost inevitable in any trial, but it rarely justifies reversal.') *We would indeed be amiss if we were to hold the police officers and magistrates to a stricter standard when evaluating evidence for a probable cause determination.* (at p. 1450.) [Emphasis supplied.]

A warrantless arrest is not as stringent and far less likely to embroil the officer in personal litigation. The Tenth Circuit's opinion, which could be interpreted to require an officer to divulge every fact known to the officer at the time the affidavit is prepared, carries the message to the law enforcement community that the Tenth Circuit is indifferent to "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties". *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). The Ninth Circuit has noted that it would be ironic indeed if the immunity to which district attorneys and magistrates are entitled results in encouraging a rule of "enhanced liability" for police officers simply because they are not

immune. *Smiddy v. Varney*, 803 F.2d 1469, 1472 (Ninth Cir. 1986). In the Tenth Circuit, liability has been enhanced to the point where a police officer is a strict liability insurer of his or her affidavit.

None of the cases the Tenth Circuit used to justify extending liability to this case adhere to the standard that the omission must be "material enough". Rather, the cases make it clear that the omission must be of such materiality that with its inclusion in the affidavit probable cause is negated. Indeed *United States v. Reivich*, 793 F.2d 957 (8th Cir. 1986), does not support the Tenth Circuit's holding here, that court acknowledging: "To the degree that the [trial court's] opinion may be read as holding that a probable cause determination is affected by the fact of omissions, regardless of whether the omitted information necessarily would have precluded a finding of probable cause, we know of no precedent for such a ruling". (At p. 962, Footnote 1.)

In *Stewart v. Donges*, 915 F.2d 572 (10th Cir. 1990) the officer never mentioned the fact that the victim had recanted. Probably the circumstances would rarely justify an officer preparing and signing an affidavit of probable cause when the officer knows the victim has recanted, but at the very least a reasonable officer would include the statement that the victim had recanted and an explanation of why the officer believed probable cause still existed. The flip side of the coin was presented in *Hale v. Fish*, 899 F.2d 390 (5th Cir. 1990) in that the victim probably ought to have recanted but steadfastly continued to claim that the Plaintiffs had kidnapped him and held him against his will; the police officers knew that there were eyewitnesses who would testify the Plaintiff went with

his alleged captors willingly and stayed with them voluntarily. Both presented scenarios where the officer ought to have been put to inquiry whether any crime had been committed at all because at issue was not simply the credibility of disinterested parties, but the truthfulness of material witnesses.

That was not the case here. There was no question that a crime had been committed. There were three likely suspects. During the course of her competent and thorough investigation, the detective came to the conclusion that Camille DeLoach was the most likely of those three suspects. The attending physicians had no discernible reason for lying. She had no reason to doubt their honesty, integrity and competency. She did not doubt Stuemke's either, but he never saw the child and his hypothetical opinion that most abuse is committed by parents did not seem to apply to this case, especially since she knew the waitress would testify the baby was fine the night before. Even Dr. Stuemke would not say that 100% of child abuse cases are perpetrated by a parent.

Finally, any analysis of causation is missing from the Tenth Circuit opinion. Let us suppose the affidavit had read: "Four doctors (the attending physicians) vote for 'immediate'; one (the medical examiner) for 4 to 48 hours; and one (Stuemke) for a few days". Probable cause would still exist. By condemning the officer's affidavit as fatally defective for not making that statement, even though probable cause would still have existed, the Tenth Circuit is requiring of an officer that the officer know to a certainty prior to a suspect's arrest that the suspect will be convicted because there is no conflicting evidence.

The Eighth Circuit does not impose any such requirement. In *Myers v. Morris*, 810 F.2d 1437, 1455 (1987) that court held:

> "The issue for immunity purposes is not probable cause in fact but 'arguable' probable cause. *Floyd v. Farrell*, 765 F.2d 1, 5 (1st Cir. 1985) ('[S]eeking an arrest warrant is objectively reasonable so long as the presence of probable cause is at least arguable.')"

Nor does the Second Circuit have such a requirement. Indeed the Second Circuit believes that: "It bears repeating that probable cause does not require an officer to be certain that subsequent prosecution of the arrestee will be successful." *Krause v. Bennett*, 887 F.2d 362, 371 (2nd Cir. 1989).

To adopt the words of amicus curiae before the Tenth Circuit, the Attorney General of the State of Oklahoma: "No clearly established federal right exists to require a police officer to substitute her judgment for that of a jury at trial merely to file an affidavit supporting an arrest warrant." An affidavit that truthfully reports the opinion of the attending physicians and draws the only logical conclusion should not oblige a police officer to pay damages. It is clear that such an affidavit would not have subjected this officer to any liability in the Second Circuit. Quoting again from *Krause, supra*:

> "It would be unreasonable and impractical to require that every innocent explanation for activity that suggests criminal behavior be proved wrong, or even contradicted, before an arrest warrant could be issued with impunity . . . It is up to the fact finder to determine whether a defendant's story holds water, not the arresting officer . . . Once officers possess facts

> sufficient to establish probable cause, they are neither required nor allowed to sit as prosecutor, judge or jury. Their function is to apprehend those suspected of wrongdoing, and not to finally determine guilt through a weighing of the evidence." (At p. 372.)

Proposition II: **A FINDING OF PROBABLE CAUSE BY A STATE COURT JUDGE WHERE THERE HAS BEEN A FULLBLOWN PRELIMINARY HEARING SHOULD ESTOP A SUBSEQUENT §1983 ACTION FOR LACK OF PROBABLE CAUSE ABSENT EVIDENCE THAT THE OFFICER KNOWINGLY ACTED OR FAILED TO ACT IN SUCH A WAY AS TO PERPETRATE A FRAUD ON THE COURT AND IN SUCH A WAY AS WAS OUTCOME DETERMINATIVE OF THE FINDING OF PROBABLE CAUSE.**

After having heard testimony on examination and cross-examination by Dr. Thomas Snowden, Ryan's pediatrician, Dr. Douglas Polk and Dr. Steven Cagle, the attending neurosurgeons, Dr. Jeffrey Pardee, the emergency room doctor, Dr. Chai Choi and Dr. Fred Jordan, the medical examiners, firefighter Dewayne Price, who was the first emergency care provider on the scene and testified to finding the baby unconscious and experiencing Kussmaul respirations, which is to say labored and irregular shallow breathing, officer Jim Hibbs who was the first police officer at the scene, both of Ryan's parents, and the Defendant detective, the Honorable Wendell Smith concluded:

> "I find there's probable cause to believe the crime of murder in the first degree was committed in Oklahoma County by Camille DeLoach."

Yet the Tenth Circuit relegates this careful determination by Judge Smith to the same level of lack of reverence reserved for "rubber-stamping" magistrates who, swamped in late night court sessions, have neither the time nor the inclination to query what is presented to them for signature. In *Franks* and in *Malley* the implied concern was that in a nonadversarial context an overworked night-court magistrate might pass on ex parte warrant applications by rote. Such a situation is radically dissimilar to that presented here. The sine qua non of due process is, as was provided here, the adversarial process.

Mr. Justice Powell, Chief Justice Rehnquist joining, wrote separately in *Malley*, and Defendant believes their views accurately caution against precisely what is of concern here:

> In cases where a criminal defendant has asserted claims of unconstitutional search and seizure, this court has consistently accorded primary evidentiary weight to a magistrate's determination of probable cause. No reason has been articulated by the Court, and certainly none occurs to me, why less weight should be accorded the magistrate's decision in a §1983 damages suit against the police officer who applied for the warrant.
>
> * * *
>
> *A more restrictive standard will discourage police officers from seeking warrants out of fear of litigation and possible personal liability.* [Emphasis supplied.]

* * *

> This Court has long sought to divide the function of law enforcement to impose on the magistrate the primary responsibility for determining whether a warrant will issue. It is inconsistent with this jurisprudence to imply or hold that the magistrate's determination of probable cause is irrelevant in this suit. A judicial officer's 'judgment call' in determining probable cause, although not conclusive, is entitled to substantial evidentiary weight in suits seeking to impose personal liability on the police officer." (*Malley,* pp. 353-354.)

Earlier, in *Franks, supra,* Mr. Chief Justice Rehnquist indicated his concern for the consequences of second-guessing state courts:

> "I am quite confident that if our system of justice were not administered by judges who were once lawyers, it might well be less satisfactory than it now is. But I am equally confident that one improvement which would manifest itself as a result of such a change would be a willingness, reflected in almost all callings in our society except lawyers, to refrain from constant relitigation, whether in the form of collateral attack, appeal, retrial, or whatever, of issues that have originally been decided by a competent authority." (at page 183.)

Less than two weeks after *DeLoach* was decided, the Tenth Circuit rendered its opinion in *Hubbert v. City of Moore,* 923 F.2d 769 (1991) which properly held that a determination of probable cause in a criminal proceeding, when the parties have had a full and fair opportunity to litigate the issues, precludes relitigation of those issues in a §1983 case. As *Allen v. McCurry,* 449 U.S. 90 (1980) requires, the determination of the Tenth Circuit was

based on two Oklahoma decisions, *Adamson v. Dayton Hudson Corporation,* 774 P.2d 478 (Ok. App. 1989) and *Lee v. Knight,* 771 P.2d 1003 (Ok. 1989), which established that determinations made in criminal proceedings are to be given preclusive effect in later civil cases. Here, to claim that Camille DeLoach did not have a full and fair hearing, and to claim that Defendant manipulated ten witnesses over a period of two days and managed to bamboozle the Honorable Wendel Smith belittles preliminary hearing proceedings in Oklahoma state courts. Probable cause to suspect that Plaintiff murdered Ryan was judicially determined to exist because probable cause to suspect that Plaintiff murdered Ryan existed in fact.

On comparable facts it is the lifeblood of the law to have consistent results. In *Bergren v. City of Milwaukee,* 811 F.2d 1139 (1987), a case involving the death of a child while in the care of a babysitter, the Seventh Circuit held:

> In this case, clearly there was probable cause for the police officers to take Michael [the babysitter] into custody. The officers knew that Kelly Tompkins [the Decedent] had been in Michael's exclusive control and that Kelly had suffered serious injuries, including a fractured skull. This information provided reasonable grounds for the police officers to believe that Michael had violated Wisconsin's child abuse laws. The existence of probable cause to arrest Michael bars Appellants' Section 1983 claim. (at p. 1142.)

In *Bergren,* the Court cites an earlier Seventh Circuit opinion, *Kompare v. Stein,* 801 F.2d 883 (1986), a case involving the death of a five-year-old under "unusual circumstances". The medical examiner determined that the child died of abdominal hemorrhaging caused by a

violent blow to his stomach. His mother was indicted for his murder. At the criminal trial the medical examiner testified that she subsequently determined the child had fibromatosis, an abdominal abnormality, but that her discovery did not change her opinion as to the cause of death. Plaintiff was acquitted. The Seventh Circuit affirmed the trial court's dismissal of Plaintiff's §1983 claim, stating:

> Mrs. Kompare's acquittal of voluntary manslaughter for the death of her son does not establish that the government lacked probable cause to prosecute her. At Mrs. Kompare's criminal trial, the government had to prove her guilt beyond a reasonable doubt. The government's failure to meet this very stringent standard does not mean that it did not meet the lesser probable cause standard, i.e., a reasonable belief that an offense has been committed and that the criminal Defendant committed the crime.
>
> * * *
>
> Richmond's [the medical examiner] discovery of fibromatosis did not change her opinion as to the cause of death, although it indicated that the blow that killed Jody might not have been as hard as Richmond originally thought. An unspecified change in the degree of force necessary to kill Jody does not negate Mrs. Kompare's guilt of the crime of voluntary manslaughter. Her prosecution was not one without probable cause. (at pp. 891-892).

The Court held: "A finding of probable cause is an absolute defense to an action for prosecution without probable cause". (at p. 891.)

As with the affidavit, so too with the preliminary hearing, the Tenth Circuit ignores the problem of causation: as we have said, even had Dr. Stuemke added his opinions to the testimony of the other eleven witnesses who appeared before Judge Smith, Judge Smith would still have bound Camille DeLoach over. It is precisely for that reason that a judicial finding of probable cause is an absolute defense to an action for prosecution without probable cause: to reduce the possibility of constant relitigation where the essential element of causation is missing.

Proposition III: **THE OFFICER WAS ENTITLED TO QUALIFIED IMMUNITY AS MATTER OF LAW.**

In lieu of a proper application of *Malley, supra,* and *Allen, supra,* the Tenth Circuit has seized upon retaliation as a new theory of recovery. The history of this case was plagued with a lack of clarity as to the substantive law predicate for retaliation for which §1983 provided the remedy. Not until the Tenth Circuit's opinion did the theory of retaliation become focused on the First Amendment. This confusion is particularly telling in light of this Court's admonition in *Anderson, supra,* that a Plaintiff not be able to subvert qualified immunity by claiming violations "of extremely abstract rights" (at p. 639).

The Tenth Circuit relies upon cases which are manifestly distinguishable. In *Norwell v. City of Cincinnati,* 414 U.S. 14 (1973), a three-page per curiam opinion, the question presented was whether a conviction would stand when a police officer arrested a 69-year-old immigrant

gentleman because his presence on the street annoyed the officer. DeLoach was not arrested because Defendant was annoyed. She was arrested because the DA was persuaded by the attending physicians that she hit or threw a baby so hard he became immediately unconscious. *Haynesworth v. Miller,* 802 F.2d 1245 (D.C. Cir. 1987) dealt with the practice of the District of Columbia Police Department to file spurious charges as a bargaining chip to encourage citizen complaints to be abandoned. Even given such blatantly invalid conduct, the Circuit referred with apparent approval to an opinion which would allow the defense that the state would still have prosecuted, even when a prima facie case of retaliation has been made. (*Haynesworth* quoting *Wilson v. Thompson,* 593 F.2d 1375 [5th Cir. 1979] to the effect that it is a defense that the state "would have reached the same decision as to whether to prosecute even had the impermissible purpose not been considered." At P. 1257, Footnote 93.) *Losch v. Borough of Parkesburg,* 536 F.2d 903 (3rd Cir. 1984) was before that Circuit on an appeal from an order granting summary judgment in yet another alleged mutual harassment case. *Coen v. Runner,* 854 F.2d 374 (10th Cir. 1988) is dictum, since qualified immunity was found to attach to the officers' conduct. *Matzker v. Herr,* 748 F.2d 1142 (7th Cir. 1984) is so egregious on its facts that the very act of relying on it ought to have put the Tenth Circuit on notice that this case required more thought. To compare a case where a flinty officer says "Pay back is hell" to a case where an inmate complained because the jail failed to provide adequate medical care after he was beaten once, and the jailers retaliated against his complaint by seeing to it he was beaten up again, and indeed ignored his cries

for more than twenty minutes before sauntering over to his aid and comfort, is arcane.

The theory of retaliation which the Tenth Circuit has adopted hinges squarely on an officer's motivation and thus runs counter to Fourth Amendment law and other qualified immunity law in which this Court has indicated a strong preference for an objective standard. *Anderson, supra; Malley, supra; Graham v. Connor,* 490 U.S. 386 (1989). Indeed, the notion that the issue in this context can be transmuted into a question of whether the right to be free from retaliation for constitutionally protected activity was clearly established under the First Amendment from a question of whether a reasonable officer could have believed Plaintiff's arrest to be lawful under the circumstances in light of Fourth Amendment principles renders *Anderson* impotent.

Here the Tenth Circuit has stripped this officer of qualified immunity on a finding that First Amendment retaliation law was well-established (two of the five cases that the Tenth Circuit relies on, *Haynesworth, supra* and *Coen, supra,* were decided after Camille DeLoach was arrested in early 1987), and that the law regarding omissions from affidavits was also well-established, again relying on cases decided after the date of this arrest, (the Tenth Circuit's own *Stewart, supra, Hale, supra* and *Jones v. City of Chicago,* 856 F.2d 985 (7th Cir. 1988)), even though there was and still is no Supreme Court case on point, and was no Tenth Circuit case, until three months before *DeLoach* itself was decided. (*Stewart*)

What a fiction this concept of "well-established" is. Most officers know their city codes and state criminal statutes well and they know about some case law from

their state's highest criminal court, and they know about *Tennessee v. Garner,* and maybe even *Graham v. Connor* already, but the Tenth Circuit wants them to be legal scholars, conversant with the law as it is developing in every circuit.

How is this fiction that officers are held to know the "well-established law" to be squared with *Brinegar v. U.S.,* 338 U.S. 160, 175-176 (1949):

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and the practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

See also: "Furthermore, a reasonable person is not expected to act as a legal scholar and predict the future direction of the law." *Kompare, supra* at p. 887.

How can we expect police officers to come to a principled distinction between *DeLoach* and *Jones'* recent progeny from its own court, *Schertz v. Waupaca County,* 875 F.2d 578 (7th Cir. 1989), affirming 683 F.Supp. 1551 (E.D.Wis. 1988), and *Simkunas v. Tardi,* ___ F.2d ___ (7th Cir. May 3, 1991). Those cases make it clear the Seventh Circuit has not interpreted its *Jones* opinion as creating an end-run around *Malley.* The post-*Jones* Seventh Circuit still maintains that "allegations of malice are insufficient to overcome" an officer's entitlement to immunity "if a reasonable officer in applying for a warrant could have believed that there was probable cause to support the application". *Schertz, supra,* p. 583. If this Defendant had arrested Camille DeLoach in Chicago instead of Oklahoma City, the judgment would have been one of

dismissal instead of actual and punitive damages. (Or in New Haven. *Magnotti v. Kuntz*, 918 F.2d 364 [2nd Cir. 1990] in which the Court held: "Magnotti argues that Kuntz's deliberate or reckless disregard for the truth established a retributive motive. But, well-established principles instruct that qualified immunity is appropriate if the affidavit accompanying the warrant is sufficient, after correcting for material misstatements or omissions, to support a reasonable officer's belief that probable cause existed." At p. 367.)

The "well-established" law with which the Tenth Circuit ought to have dealt is that if a statement of fact which is omitted from an affidavit is added in and thereby renders the warrant application "so lacking in indicia of probable cause as to render official belief in its existence unreasonable" then and only then will the officer be stripped of immunity. *Malley*, at p. 342. This affidavit of probable cause could have included Stuemke's opinion without rendering official belief in the existence of probable cause questionable much less unreasonable, and this officer should not have been deprived of the defense of qualified immunity.

Conclusion:

We come before this Court in a climate unfavorable to the sympathy voiced below by both amici, quoting from *Pierson v. Ray*, 386 U.S. 547 (1967), about "a policeman's lot" (p. 555) and how it is not supposed to be as unhappy as the trial court and the Tenth Circuit have made it. Now the attention of the nation is on victimization perpetrated by those few who perhaps deserve an

unhappy lot. This officer is not one of them. She may have had personal feelings about this investigation but she is human and not a robocop. Her personal feelings did not dictate her actions – the existence of probable cause did. Probable cause existed in this case as a matter of fact. Alternatively, probable cause was reasonably believed to exist, and the Defendant was entitled to be shielded by the doctrine of qualified immunity.

Pierson and every Supreme Court decision on point since *Pierson, Franks* and *Harlow* and *Mitchell* and *Malley* and *Anderson,* have had at their core an appreciation for the delicate balance between three competing interests: each citizen's rights secured and protected by the Constitution; each public official's need to anticipate with some degree of certainty what conduct may give rise to liability; and the right that belongs to each of us to expect that our public officials will be able to perform their duties without constantly being interrupted by lawsuits and without being inhibited by the fear of lawsuits.

But the delicate balance that the Supreme Court has tried to strike succumbed to weighted scales in the courts below. So, too, did another delicate balance: comity between federal and state courts. As Chief Justice Rehnquist has foreseen, what has been lost is "perspective as to the purposes of the system as well as of the warrant requirements of the Fourth and Fourteenth Amendments". *Franks,* p. 182.

Petitioner respectfully prays that a Writ of Certiorari issue to the United States Court of Appeals for the Tenth Circuit. This officer was and is entitled to judgment as a matter of law because this §1983 action was barred by

judicial determination of probable cause; alternatively, she was entitled to judgment because probable cause existed as a matter of law; alternatively, she was entitled to qualified immunity as a matter of law.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CAMILLE DeLOACH, Plaintiff-Appellee, v. MITZI BEVERS, Defendant-Appellant.	)))))))	No. 88-2978 (Filed Dec. 31 1990)

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. CIV-87-2077-W)

Robert E. Manchester (Haven Tobias with him on the brief) of Cooper, Manchester, Hiltgen & Healy, Oklahoma City, Oklahoma, for defendant-appellant.

Steven M. Angel (Carl Hughes with him on the brief), Oklahoma City, Oklahoma, for plaintiff-appellee.

Robert H. Henry, Attorney General of Oklahoma, and Robert A. Nance, Assistant Attorney General, Chief, Federal Division, Oklahoma City, Oklahoma, filed an amicus curiae brief on behalf of the State of Oklahoma in support of defendant-appellant.

James P. Manak, Associate Counsel, and Wayne W. Schmidt, Executive Director, Americans for Effective Law Enforcement, Inc., Chicago, Illinois (Of Counsel Fred E. Inbau, John Henry Wigmore Professor of Law Emeritus, Northwestern University School of Law, Chicago, Illinois) filed an amicus curiae brief on behalf of Americans for

Effective Law Enforcement, Inc., joined by The International Association of Chiefs of Police, Inc.; The National District Attorneys Association; The National Sheriffs Association; and The Oklahoma Association of Chiefs of Police in support of defendant-appellant.

Before LOGAN and BRORBY, Circuit Judges, and BRATTON, District Judge.*

LOGAN, Circuit Judge.

Defendant Mitzi Bevers[1] appeals from judgment entered following a jury verdict in favor of plaintiff Camille DeLoach in her civil rights action under 42 U.S.C. § 1983. Bevers asserts that the district court erred in failing to grant her motions in the alternative for judgment notwithstanding the verdict or a new trial.

This case arises out of the investigation into the death of eighteen-month-old Ryan Swift. Both of Ryan's parents had full-time jobs, and DeLoach was Ryan's daycare sitter. Ryan's father left him at DeLoach's home in the morning of September 11, 1985, and when Ryan's mother arrived to pick him up at 4:00 that afternoon, Ryan was comatose. He was taken to a hospital, where he died the

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* The Honorable Howard C. Bratton, Chief Judge, United States District Court for the District of New Mexico, sitting by designation.

[1] Defendant married after commencement of this action and is sometimes referred to in the record as Mitzi Bevers Welch, Mitzi Welch, or Detective Welch.

next day from swelling of the brain caused by a severe blow to the head.

The attending neurologists who operated on Ryan were of the opinion that the blow to Ryan's head was so severe that it would have rendered him unconscious immediately, and, therefore, had to have occurred while Ryan was in DeLoach's care. The medical examiners who performed the autopsy on Ryan and another expert were of the opinion that the blow could have been delivered some time before September 11. The autopsy also revealed numerous bruises on Ryan consistent with persistent abuse.

Bevers was the police detective assigned to investigate Ryan's death. Some time in October 1985, she presented the case file of her investigation to Assistant District Attorney Donald Deason. Deason declined to proceed, believing the evidence was insufficient to convict. But in March 1987, at the urging of Douglas L. Polk, M.D., one of the attending neurologists, District Attorney Robert Macy decided to initiate prosecution of DeLoach for first degree murder. Bevers prepared an affidavit which induced a magistrate to issue a warrant for DeLoach's arrest. DeLoach was arrested and after a preliminary hearing was bound over for trial. After a jury was empaneled for DeLoach's trial, the government withdrew the charge.

DeLoach then filed this § 1983 suit alleging that Bevers violated DeLoach's constitutional rights by retaliating against her for exercise of her right to retain counsel and by preparing an intentionally false and misleading affidavit which caused her arrest on first

degree murder charges. The jury found for DeLoach on both counts, awarding compensatory damages of $150,000 and punitive damages of $75,000. We affirm.

I

DeLoach's claim of unconstitutional retaliation alleged that Bevers took various actions leading to DeLoach's arrest and to her being bound over for trial, and that Bevers did so in retaliation for DeLoach's decision to hire an attorney when she became a suspect in Ryan's death. "An act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper." *Matzker v. Herr*, 748 F.2d 1142, 1150 (7th Cir. 1984); *see also Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973); *Haynesworth v. Miller*, 820 F.2d 1245, 1257 (D.C. Cir. 1987); *Losch v. Borough of Parkesburg*, 736 F.2d 903, 907-08 (3d Cir. 1984). The unlawful intent inherent in such a retaliatory action places it beyond the scope of a police officer's qualified immunity if the right retaliated against was clearly established. *See Coen v. Runner*, 854 F.2d 374, 378-79 (10th Cir. 1988); *Losch*, 736 F.2d at 909-10.

Bevers contends that DeLoach had no Sixth Amendment right to counsel when she was merely a suspect in the criminal investigation. The right to retain and consult with an attorney, however, implicates not only the Sixth Amendment but also clearly established First Amendment rights of association and free speech. *See generally United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *NAACP v. Button*, 371 U.S. 415 (1963). "Thus,

while private parties must ordinarily pay their own legal fees, they have an undeniable right to retain counsel to ascertain their legal rights." *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982) (footnote omitted).

There was sufficient evidence from which a reasonable jury could conclude that Bevers worked to cause DeLoach's arrest and prosecution at least partly in retaliation for DeLoach's decision to hire an attorney. Dennis DeLoach testified that after his wife hired an attorney, Bevers expressed displeasure, saying, "Well that's not being very cooperative," and thereafter appeared unhappy with DeLoach. II R. 99-100. A retired police officer acquainted with DeLoach testified that when he called on the night of DeLoach's arrest to ask if Bevers would allow DeLoach to surrender herself to authorities, Bevers replied, "Payback is hell, that's what she got for hiring a smart-ass lawyer." III R. 311. Bevers admitted saying "payback is hell" in reference to DeLoach's failure to "cooperate." IV R. 542, 610. At trial Bevers persisted in contending that DeLoach did not cooperate, but she never identified any such failure. She admitted that DeLoach answered all questions she asked in her interviews and voluntarily permitted as search of her house. The only evidence in the record supporting any failure to cooperate is DeLoach's attorney's request that the second Bever interview of DeLoach be at the DeLoach home rather than at the police station. *See* II R. 99-100. Apparently DeLoach, upon advice of counsel, also refused Bevers' request that she take a lie detector test. This was not before the jury, however.[2]

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[2] There is nothing in the appellate record indicating that Bevers sought to introduce evidence of DeLoach's refusal to

(Continued on following page)

Bevers argues that she cannot be held responsible for DeLoach's arrest and prosecution because there were many intervening actors making independent determinations to arrest and prosecute: the district attorney's office, the magistrate issuing the arrest warrant, and the judge at the preliminary hearing. But there was evidence from which the jury could believe that Bevers manipulated the process by mischaracterizing the evidence and by concealing the exculpatory opinion of a key medical expert. Some time in October 1985, Bevers interviewed John H. Stuemke, M.D., Medical Director of Outpatient Department and Emergency Services for Children's Hospital, an expert in child abuse who was often consulted by the district attorney's office and who had testified for the prosecution in many cases.[3] Dr. Stuemke's opinion was

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take a lie detector test as evidence relevant to the retaliation claim. On appeal Bevers does challenge the district court's refusal to permit evidence of polygraphs taken by Ryan's parents, the Swifts. She argues this was relevant, not on the issue of whether the Swifts committed the crime, but to support Bevers' belief that DeLoach had committed the crime and hence to support her filing of the affidavit that led to DeLoach's arrest. We uphold the district court's decision on the exclusion of the lie detector evidence. The firmness of Bevers' conviction about DeLoach's guilt, based upon the Swifts having passed lie detector tests is not relevant to, and does not justify, either retaliatory action against DeLoach or falsehoods or omissions in Bevers' affidavit to support an arrest warrant.

[3] There was conflicting testimony over whether Assistant District Attorney Deason was also present for this interview, but Deason testified that he had no knowledge of the interview. II R. 163.

that it was much more likely that one of Ryan's parents had rendered the fatal blow than DeLoach, and that the blow could have and probably did occur twenty-four hours or more before the child became comatose. Yet, Bevers did not make an investigative report of this interview to be included in the investigation file for use by the district attorney's office, apparently the only interview she did not record. She also did not report Dr. Stuemke's opinion in her affidavit supporting the arrest warrant. Because Bevers admitted that she knew exculpatory evidence in her file was required to be made available to a defense attorney, *see* IV R. 557-58, the jury could believe her failure to make a record of this interview or to mention it later was deliberate. When Bevers testified at the preliminary hearing, she completely mischaracterized the substance of the interview and Dr. Stuemke's opinion, avoiding any exculpatory implications. When the district attorney's office consulted Dr. Stuemke shortly before DeLoach's trial, it was his opinion that convinced them to dismiss the charges against DeLoach. Indeed, Assistant District Attorney Deason testified that if Dr. Stuemke's opinion had been known before DeLoach's arrest, she would not have been arrested. II R. 169.

In *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988), the court stated:

> "[A] prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial – none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision.

> . . . If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute. . . . They cannot hide behind the officials whom they have defrauded."

Id. at 994 (citations omitted). Likewise, Bevers cannot hide behind the decisions of others involved in DeLoach's arrest and prosecution if she deliberately conceals and mischaracterizes exculpatory evidence.

II

DeLoach alleged that Bevers violated her Fourth Amendment rights by causing her to be arrested pursuant to an intentionally false and misleading affidavit. Bevers contends that she is entitled to qualified immunity under the doctrine of *Malley v. Briggs*, 475 U.S. 335 (1986). In *Malley*, qualified immunity in § 1983 actions was equated with the good-faith exception to the exclusionary rule laid down in *United States v. Leon*, 468 U.S. 897 (1984). *Malley*, 475 U.S. at 344. *Leon* reaffirmed the doctrine of *Franks v. Delaware*, 438 U.S. 154 (1978), that a warrant must be voided "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Leon*, 468 U.S. at 923. Thus, "[w]here the judicial finding of probable cause is based solely on information the officer knew to be false or would have known to be false had he not recklessly disregarded the truth, not only does the arrest violate the fourth amendment, but the officer will not be entitled to good faith immunity [under § 1983]."

Olson v. Tyler, 771 F.2d 277, 282 (7th Cir. 1985). A reckless disregard for the truth exists when "the affiant 'in fact entertained serious doubts as to there truth of his' allegations, . . . [and] a factfinder may infer reckless disregard from circumstances evincing 'obvious reasons to doubt the veracity' of the allegations." *United States v. Williams*, 737 F.2d 594, 602 (7th Cir. 1984) (quoting *St. Amant v. Thomas*, 390 U.S. 727, 731-32 (1968)), *cert. denied*, 470 U.S. 1003 (1985). The *Franks* rule applies to omissions as well as affirmative misstatements, if the omissions are so probative they would vitiate probable cause. *Stewart v. Donges*, 915 F.2d 572, 582 n.13, 583 (10th Cir. 1990). Recklessness may be inferred from omission of facts which are "clearly critical" to a finding of probable cause. *Hale v. Fish*, 899 F.2d 390, 400 (5th Cir. 1990); *United States v. Reivich*, 793 F.2d 957, 961 (8th Cir. 1986).

There was evidence from which the jury could conclude that Bevers made intentional or reckless misstatements in her arrest affidavit. The third paragraph of the affidavit stated "[t]hat the defendant made statements to the affiant that the child had fallen on a toy tonka truck and this was the injury to the forehead and the left ear. These statements are inconsistent with the type and magnitude of the injury found by the doctors." Addendum to Appellant's Brief in Chief, tab 5. DeLoach's testimony, as well as a transcripted interview of DeLoach by Bevers, revealed, however, that DeLoach merely offered this incident as the only instance on September 11 she could recall where Ryan could have sustained any injury while in her care.

Paragraph five of the affidavit included the following: "And further statements made by CAMILLE MEYER

DELOACH to the affiant were that she had found the child not breathing and that she had administered CPR, and after getting the child to breath failed to contact emergency assistance while waiting approximately 15-20 minutes for the mother to arrive to pick the child up." *Id.* But DeLoach's transcripted interview with Bevers and Bevers' report of her initial interview with DeLoach both reveal that the child was breathing and his was an exaggeration of the amount of time DeLoach said passed between resuscitation and the arrival of Mrs. Swift. *Id.* tab 6, at 1 (transcript of interview on 10-8-85) ("He was just real lethargic, and just breathing shallow so I gave him mouth to mouth and he seemed to pick up his breathing and then she arrived and we called the ambulance."); *id.* tab 2, at 2 (defendant's report of interview on 9-12-85) ("She stated that . . . she checked on Ryan and found him not to be breathing very much and at this time attempted to administer CPR. A few minutes later, Mrs. Swift came to pick up Ryan and it was at that time that the ambulance and the Fire Dept. were called.").

Paragraph four of the affidavit provided as follows:

> "From further investigation by the affiant and interviews with Dr. Polk who was the treating neurologist on the case, Dr. Polk told this affiant that he performed a craniotomy and that Ryan T. Swift suffered an acute injury from a blow to the head. Dr. Polk and Dr. Cagle both related to the affiant that the victim, Ryan T. Swift would have immediately gone into unconsciousness. Dr. Cagle was the assisting neurologist in the case and was present during the craniotomy. Both Dr. Polk and Dr. Cagle told the affiant that the injury had to be one of a non-accidental nature."

Id. While all this information is true, Bevers failed to set forth the opinion shared by the medical examiners and Dr. Steumke [sic] that the fatal blow could have been rendered more than a day before Ryan became unconscious, even though Bevers did relate that the medical examiners had ruled the death a homicide. Bevers also excluded all reference to autopsy findings of any bruises of varying ages covering the infant's body.

Not all errors and omissions will negate probable cause, of course, and not all evidence known to the officer need be included in every affidavit used to secure an arrest warrant. But in the case of omitted evidence it is not enough to ask simply whether the truthful statements included in the affidavit are by themselves sufficient to support a probable cause finding; the court also must ask if inclusion of the omitted material would negate probable cause. Thus, in *Stewart* we held that failure to disclose in an affidavit that the main complainant had recanted his testimony "would be a reckless omission of a material fact in violation of plaintiff's clearly established rights because the affidavit would not support probable cause if it were modified so as to include that exculpatory evidence." 915 F.2d at 583. In *Hale,* the Fifth Circuit found an officer's failure to mention "information garnered from a number of witnesses which tended to contradict [the officer's] allegations" to fall into the "clearly critical" category. 899 F.2d at 400. In the instant case, the fact that the prosecution reposed great confidence in Dr. Stuemke's opinion, evidenced by his frequent use as an expert witness for the prosecution and that the district attorney dropped the charges upon learning Dr. Stuemke's views, is strong evidence that probable cause

would have been vitiated had Dr. Stuemke's views been incorporated in the affidavit of probable cause.

We have long recognized that it is a jury question in a civil rights suit whether an officer had probable cause to arrest. *E.g., Stringer v. Dilger,* 313 F.2d 536, 541 (10th Cir. 1963); *Marland v. Heyse,* 315 F.2d 312, 314 (10th Cir. 1963).

> "It is true that the issue of probable cause odinarily [sic] is for the judge rather than the jury. That is because the issue usually arises in the context of a motion to suppress evidence, which the judge decides. But where the issue arises in a damage suit, it is, as the panel opinion acknowledged, a proper issue for the jury if there is room for a difference of opinion. The underlying issue in deciding whether the police had probable cause to do what they did is reasonableness, which is also the underlying issue in deciding negligence – a classic jury issue."

Llaguno v. Mingey, 763 F.2d 1560, 1565 (7th Cir. 1985) (en banc) (citations omitted) (probable cause to search). This rule applies also to cases in which the officers made the misrepresentations in an application for an arrest warrant. *Easton v. City of Boulder,* 776 F.2d 1441, 1448 (10th Cir. 1985), *cert. denied,* 479 U.S. 816 (1986); *see also Malley v. Briggs,* 475 U.S. 335, 341 & n.4 (1986).

Based upon Bevers' own admissions on cross-examination at trial, the jury could believe the misstatements and omissions in the affidavit were deliberate. *See* IV R. 580-85. The alleged misstatements and omissions in this case clearly were material enough that the district court was justified in submitting the question of probable cause to the jury.

III

Bevers challenges several jury instructions and the district court's failure to give other instructions. As to most of these, Bevers made no objection at trial, so the challenges must be judged by a plain error standard. After carefully reviewing defendant's objections in light of the instructions and the record as a whole, we believe the instructions gave the jury ample understanding of the issues and applicable standards, and Bevers was not prejudiced by any particular instruction. *See Big Horn Coal Co. v. Commonwealth Edison Co.*, 852 F.2d 1259, 1271 & n.19 (10th Cir. 1988).

The only issue that Bevers has raised and that concerns us regarding the award of punitive damages is her claim for remittitur on the basis that the sum of $75,000 is three times Bevers' net worth. She correctly points out that such damages are to punish and not to bankrupt a defendant against whom they are awarded. *See Thiry v. Armstrong World Indus.*, 661 P.2d 515, 518 (Okla. 1983). The only argument made to the district court in Bevers' motion for remittitur and brief in support, however, was that "there was no evidentuary [sic] basis for the jury to conclude that Plaintiff was entitled to an award" of $75,000, and that the award "is so overly punitive as to suggest the jury was swayed by passion and prejudice and did not take into consideration evidence of Defendant's assets and net worth." I R. tab 144 at 1. Both are all-or-nothing arguments, not focused specifically on Bevers' ability to pay. The jury did have evidence of Bevers' net worth; but it was not permitted to consider whether Bevers had insurance coverage. If, as now claimed on appeal, insurance does not cover the punitive

damages award, that information should have been presented to the district court in support of the remittitur motion. Because Bevers failed to make such an argument to the district court, we will not consider it on appeal.

This is a tragic case. Bevers admitted that she made up her mind that DeLoach, the babysitter, was guilty of murder shortly after her first interviews with the three principal suspects – DeLoach and the child's parents. She apparently never waivered from that belief, and a jury could believe it very much affected her actions thereafter: that she took DeLoach's hiring of a lawyer as evidence of guilt; that she did not pay attention to Dr. Stuemke's opinions because the doctor did not agree with her views (Dr. Stuemke testified to that effect); that she deliberately failed to record Dr. Stuemke's views to prevent the defense lawyer from obtaining that exculpatory information; and that when the district attorney decided to file the case and Bevers was asked to prepare an affidavit, she deliberately slanted the facts by misstatements and omissions to help persuade the magistrate to issue the warrant. The amicus briefs are alarmed that upholding the verdict against Bevers will chill future law enforcement officers. But accepting the jury's findings as true, what Bevers did is totally unacceptable behavior for an investigative officer. Impelled by her own bias to slant the evidence, she improperly hindered the others whom the law supposes will make impartial determinations – the district attorney and the magistrate – before DeLoach is required to undergo the ordeal of arrest and trial for first degree murder.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CAMILE DELOCH,
Plaintiff-Appellee,
v.
THE CITY OF THE VILLAGE,
Defendant,
and
MITZI BEVERS, individually and in her official capacity,
Defendant-Appellant.

No. 88-2978

ORDER
Filed February 25, 1991

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges, and BRATTON*, District Judge.

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*The Honorable Howard C. Bratton, District Judge, of the United States District Court for the District of New Mexico, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

/s/ Patrick Fisher
By Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CAMILLE DELOACH, Plaintiff,	)	No. CIV-87-2077-W
vs.	)	FILED
MITZI BEVERS, Defendant.	)	Aug. 31 88

JUDGMENT

The issues between the plaintiff, Camille Deloach, and the defendant, The City of the Village, having been resolved upon Motion for Summary Judgment in favor of the defendant municipality, this action came on for trial before the Court, the Honorable Lee R. West, District Judge, presiding, on the claims of the plaintiff against defendant Mitzi Bevers. These claims having been tried and the jury having duly rendered its verdict,

It is ORDERED and ADJUDGED that the plaintiff, Camille Deloach, recover of the defendant, Mitzi Bevers, actual damages in the amount of $150,000.00 and punitive damages in the amount of $75,000.00 with interest thereon at the rate provided by law and her costs of the action.

Dated at Oklahoma City, Oklahoma, this 31st day of August, 1988.

/s/ Lee R. West
LEE R. WEST
UNITED STATES
DISTRICT JUDGE
ENTERED IN JUDGMENT
DOCKET ON 8-31-88.